

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 267/2002

APPELLANT
(IN JAIL)

: Madan Lal S/o Ramlal
Aged about 20 years,
R/o Sanjay Nagar, Bhanupratapur,
PS & Tehsil: Bhanupratapur,
Distt. Kanker (CG).

VERSUS

RESPONDENT

: State of Chhattisgarh
Through P.S.: Bhanupratapur
Distt. Kanker (CG).

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL
P R O C E D U R E

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 267 of 2002

Madan Lal

Vs.

State of Chhattisgarh

JUDGMENT

Post for 11.12.2006

Sd/-
Sunil Kumar Sinha
Judge

(Sd/-
Dy. J.A.)

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 267 of 2002**

Madan Lal

Vs.

State of Chhattisgarh

Appearance:

Shri Adil Minhaj and Shri Kasif Shakeel, counsel for the appellant.

Shri Sudhir Bajpai, Deputy Govt. Advocate, for the State.

JUDGMENT

(11.12.2006)

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentence awarded to the appellant in Sessions Trial No.389/2001 on 13.2.2002 by the Special Judge, under the Scheduled castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bastar at Jagdalpur, whereby the appellant has been convicted u/s 376(1) IPC and section 3(1)(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Special Act) and sentenced to undergo R.I. for 7 years and to pay a fine of Rs.3000/-, in default of payment of fine to further undergo R.I. for 1½ years and R.I. for 3 years and fine of Rs.2000/-, in default of payment of fine to further undergo R.I. for six months, respectively.

(2) The case of the prosecution is that the prosecutrix Ku. Javendri @ Pushpa, a girl aged about 15 years, was subjected to sexual intercourse by this appellant for many times saying that he would marry her. As a result of their long sexual relations, the prosecutrix became pregnant on account of which, a meeting in the village was held and when nothing fruitful came out from the meeting, a first information report was lodged by the prosecutrix on 18.6.2001. In this report, she makes allegations that she was subjected to sexual intercourse by this appellant for the first time one year prior to the lodging of report. The F.I.R. has been proved as Ex.P.3. On this report, the investigation commenced and

ultimately after completion thereof, charge sheet was filed under the aforesaid section of the IPC and the Special Act. On conclusion of trial, the appellant was held guilty under the said section of IPC and Special Act and was directed to suffer the sentences, concurrently, referred to above.

(3) On the basis of conduct of the prosecutrix, Ku. Javendri @ Pushpa (P.W.3), the Special Judge, recorded a finding vide Para 15 of the Judgment that all the times the sexual intercourses were done with the consent of the prosecutrix and she was a consenting party which is also supported by the contents of the F.I.R. (Ex.P.3). However, he also recorded a finding that since the age of the prosecutrix was proved to be below 16 years, therefore, her conduct showing her consent will have no meaning and the appellant would be held guilty of offence u/s 376(1) of IPC. For the offence under the Special Act, the Special Judge said that since the prosecutrix belongs to Gond caste which has been scheduled as a Scheduled Tribe for the purposes of the said Act and the appellant, being in a position to dominate the will of the prosecutrix, has sexually exploited her, therefore, he would also be guilty of an offence punishable u/s 3(1)(xii) of the Special Act.

(4) Learned counsel for the appellant argued that the finding in relation to the age of the prosecutrix is not in accordance with law and, in fact, the prosecution has been failed to prove that the prosecutrix was below 16 years of age on the date of incident. He secondly argued that in the facts and circumstances of this case, when the prosecutrix was a consenting party with the appellant and both had enjoyed their long sexual relations, therefore, only because the prosecutrix happens to be the member of Scheduled Tribe, an offence u/s 3(1)(xii) of the Special Act would not be made out.

(5) On the other hand, learned State Counsel opposed these arguments. He supported the finding of the age recorded by the Special Court and he also supported the conviction and sentences awarded under both the counts.

(6) I have heard learned counsel for the parties at length and have also perused the records of the special case.

(7) For proving the age of prosecutrix, the prosecution has examined Raja Ram (P.W.3), father of the prosecutrix and it has also examined the Headmaster of the School, Chamru Ram Gowde (P.W.5) and has produced the age declaration form, proved as Ex.P.5 and copy of admission register-Ex.P.6. After proving these documents, their copies have been retained in the file of Sessions Trial as Ex.P.5(c) and P-6(c). P.W.5 Chamru Ram Gowde deposes that the declaration form submitted to the school at the time of admission of the prosecutrix shows that her date of birth was 20-6-1986. He also deposes that the same date of birth has been entered into the admission register (Ex.P.6). He also deposes that the girl has left the institution on 05.7.1993 after passing Class-II. The contents of the admission register Ex.p.6 would show that the prosecutrix was admitted in the aforesaid institution on 8.7.1992 in Class-I and according to this document, her date of birth was entered as 20.6.1986. It comes in the evidence of the father, in para-1, that the girl was aged about 15 years at the time of occurrence. However, he admits in para 8 of his cross examination that when the girl was admitted to the school, she was aged about 7 years. About the basis of the specific entry pertaining to the date of birth, given at the time of admissions, this witness said that he is not educated, but he had got some education under *Prod Shiksha Scheme*. He cannot tell the date of his marriage. He cannot tell the date of the death of his father and mother but he says that one of his brothers, who is a Peon had written the actual date of birth of the prosecutrix on a paper and had handed over the said paper to him while he was going to admit the prosecutrix in school and he had handed over that very paper to the school. If this part of evidence of this witness is tested in light of the evidence of Head Master Chamru Ram Gowde (P.W.5), that appears to be totally false as the Head Master admits vide para 11 in his cross examination that it is true that when some uneducated person brings some written document with a noting of date of birth on it, then, such paper is enclosed with the declaration form, but, no such paper is enclosed in the register of

declaration form brought by him. This goes to show that the father is giving some unusual evidence to any how support his contention that the girl was aged about 15 years on the date of incident. When we look into the evidence of prosecutrix, she straight way admits in para-8 of her cross examination that she must be aged about 8 years on the date of her admission in the school. It also comes in para 7 of her evidence that her menses had began 8 years prior to the date of incident. The lady Doctor Smt. Kiran Lata Thakur (P.W.4) has deposed that the girl was fully grown up and her secondary sexual characters were well developed, her vagina was easily admitting two fingers and she was carrying pregnancy of 20 to 24 weeks. She has admitted in para 4 of her cross examination that since it was written in the requisition slip that the girl was aged about 15 years, therefore, she has also written her age as 15 years, but since she has found her secondary sexual characters well developed, the girl can be said to be a major.

(8) In AIR 1965 S.C. 282 - Brij Mohan Singh -vs- Priya Brat Narain Sinha and others, it has been held by the Apex Court that in actual life, it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Apex Court further said that the court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive.

(9) While dealing with the question of age in a matter u/s 366 IPC, the High Court of Punjab and Haryana observed in AIR 1970 P & H 450 - Raunki Saroop -vs- State that it is a matter of common knowledge that the ages given at the time of admission of girls and boys in schools are far from being precise. More often than not, attempt is made by the parents and guardians of their wards, who get admission in the schools, to under state their ages and to give a later date of birth than the real one. Thus, the ages given in the school certificates are not dependable for

determination of the precise date of birth of a student, to whom the entry as to the date of birth in the school records pertains.

(10) In view of the above facts and circumstances, it does not appear to me that in light of the evidence of the father and the Headmaster and further in light of the evidence of prosecutrix and the lady Doctor, the entry made on the basis of declaration given by the father should be held to be correct so as to make it dependable for determining the age of the girl for convicting the appellant u/s 376(1) IPC. In appreciation of the entire evidence led by the prosecutrix, I hold that the prosecution could not establish, beyond reasonable doubt, that the girl was below 16 years of age on the date of incident and I hold it accordingly. Consequently, I also hold that since the girl was not proved to be a minor, her conduct would show that she was a consenting party with the appellant, as has also been held by the Special Judge. In the facts and circumstances of this case, the conviction u/s 376 (1) of IPC cannot be sustained. The same is hereby set aside.

(11) So far as conviction under the Special Act is concerned, it is suffice to say that the mere fact that the victim happened to be a girl belonging to a Scheduled Caste or Scheduled Tribe does not attract the provisions of the Special Act. Apart from the fact that the prosecutrix belongs to the *Gond* caste, there is no other evidence to record a finding that the appellant committed an offence u/s 3(1)(xii) of the Special Act. For an offence u/s 3(1)(xii) it must be proved that the accused was in a position to dominate the will of a woman belonging to a Scheduled Caste or Scheduled Tribe, and uses that position to exploit her sexually, to which she would not have otherwise agreed. In the present case, it does not come that the accused was in a dominating position. Rather the conduct and evidence of the prosecutrix would show that she has consented for commission of sexual intercourse and the sexual intercourses were committed for so many times on account of the fact that both had to marry with each other. If a girl gives consent for repeated sexual intercourse upto a very long duration on the ground that they are going to marry recently and she happens to be a member of Scheduled Caste or Scheduled Tribe, by chance,

an offence u/s 3(1)(xii) of the Special Act would not be made out because it was her own will that she consented, may be on account of love or the reason to marry with the appellant. In the given facts and circumstances, the conviction of the appellant u/s 3(1)(xii) of the Special Act cannot be sustained.

(12) In the result the appeal is allowed. The conviction and sentence awarded to the appellant are set aside. The appellant is acquitted of the charges framed u/s 376(1) IPC and section 3(1)(xii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It is reported that the appellant is in jail. He be released forthwith if not required in any other cases.

Rao

Sd/-
Sunil Kumar Sinha
Judge